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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No. 18-md-02843-VC-JSC

This document relates to:

ALL ACTIONS

**KISS DEFENDANT FLO HEALTH
INC.'S OPPOSITION TO MDL
PLAINTIFFS' ADMINISTRATIVE
MOTION TO CONSIDER WHETHER
CASES SHOULD BE RELATED**

Judge: Hon. Vince Chhabria
Courtroom: 4, 17th Floor

Flo Health, Inc. (“Flo Health”) files this opposition to the MDL Plaintiffs’ administrative motion to relate *Kiss v. Flo Health, Inc. et al.*, Case No. 3:21-cv-04333-JD, to the above-captioned case (the “Facebook MDL”). Flo Health joins and incorporates by reference the arguments Facebook makes in its opposition to the MDL Plaintiffs’ motion to relate. Flo Health files this memorandum to make the additional arguments set forth below.

The Court should not designate *Kiss* as related to the Facebook MDL. The cases do not concern substantially the same parties, property, transaction or event. The plaintiffs are different, all but one defendant is different, and the disputes revolve around wholly unrelated allegations. Moreover, removing *Kiss* from its existing consolidation with six virtually identical lawsuits and placing it in the Facebook MDL—an unrelated, complex MDL that the parties have been litigating for more than three years—would add unnecessary and duplicative burdens on Flo Health, the Court, and the other parties involved in *Kiss* and the Facebook MDL. Further, it would *create*, not prevent, the possibility of inconsistent rulings.

BACKGROUND

Flo Health is a leader in the “fem-tech” space and plays a critical role in supporting and advancing women’s health in the U.S. and abroad. Flo Health’s mobile application, the Flo App, provides access to information about women’s reproductive health and allows its users to track information related to all phases of the reproductive cycle. Among many other features, the App also serves as a forum for users to discuss health-related topics. Launched as a start-up in 2016, Flo Health has now grown to a company of some 300 employees. The Flo App is available in more than 30 countries, including in many communities where such information regarding women’s reproductive health is not otherwise available. Flo Health offers much of its services for free. Starting in 2017, in recognition of Flo Health’s worldwide campaign to spread awareness about women’s reproductive and sexual health issues, the United Nations began partnering with Flo Health in furtherance of that mission.

Starting earlier this year, plaintiffs began filing putative class action lawsuits against Flo Health regarding the same baseless allegations that it sold and/or shared information about its users with third parties. To date, plaintiffs have filed eight virtually identical lawsuits: (1) *Frasco*

1 *v. Flo Health, Inc.*, Case No. 21-cv-757; (2) *Wellman v. Flo Health, Inc.*, Case No. 21-cv-1099;
 2 (3) *Pietrzyk v. Flo Health, Inc.*, Case No. 21-cv-1141; (4) *Chen v. Flo Health, Inc.*, Case No. 21-
 3 cv-1485; (5) *Gamino v. Flo Health, Inc.*, Case No. 21-cv-2551; (6) *Kiss v. Flo Health, Inc.*, Case
 4 No. 21-cv-4333; (7) *Ridgway v. Flo Health, Inc.*, Case No. 21-cv-3031; and (8) and *Clements v.*
 5 *Flo Health, Inc.*, Case No. 21-cv-06147. The named plaintiffs in each of these cases purport to
 6 represent the same putative class of Flo App users. With the exception of *Clements*, these cases
 7 have been marked as “related” and assigned to Judge Donato in the U.S. District Court for the
 8 Northern District of California.¹ Last week, Judge Donato consolidated these cases (collectively,
 9 the “Consolidated Flo Health Cases”) and ordered the parties to hold a Rule 26(f) conference.
 10 *See Frasco*, CMC Order at 1 (ECF 59).

11 ARGUMENT

12 Civil Local Rule 3-12 provides that actions are related when (1) they “concern
 13 substantially the same parties, property, transaction or event,” *and* (2) if conducted before
 14 different judges, “[i]t appears likely that there will be an unduly burdensome duplication of labor
 15 and expense or conflicting results.” Civ. L.R. 3-12(a). Neither factor is satisfied here, and the
 16 Court should not designate *Kiss* as “related” to the Facebook MDL.

17 ***I. The Kiss Action and the Facebook MDL Do Not Share Substantially the Same Parties,*** 18 ***Property, Transaction or Event.***

19 If there is any relation between the events or transactions alleged in *Kiss* and the Facebook
 20 MDL, the relationship is one of exact opposites. As the Court is aware, the Facebook MDL was
 21 triggered in 2018 by allegations that Facebook shared personal information about its users with
 22 Cambridge Analytica, a political consulting firm. At the heart of the MDL Plaintiffs’ claims are
 23 the allegations that Facebook improperly shared data about Facebook users with third-party App
 24 Developers. Indeed, the MDL Plaintiffs claim that Facebook allowed third-party App Developers
 25 to access the content Facebook users uploaded to Facebook through various means, chiefly

27 ¹ *Clements* was filed just last week, on August 10, 2021. Pursuant to discussions with plaintiff’s
 28 counsel in *Clements*, Flo Health anticipates *Clements* to be related to *Frasco* and reassigned to Judge
 Donato, where it will be consolidated with *Frasco* and the Consolidated Flo Health Cases.

1 “through its use of various API technology.” *See* MDL Pls.’ 2d Am. Compl. ¶¶ 338-373.

2 Unlike the MDL Plaintiffs who claim Facebook *shared data* with third parties, the
 3 plaintiff in *Kiss* claims the exact opposite: that Facebook Analytics, and the other *Kiss* defendants,
 4 *received data* from Flo Health. *See, e.g., Kiss* Compl. (attached as Ex. A to MDL Pls.’ Mot. to
 5 Relate) ¶¶ 19, 20, 269, 279, 285. Even more, there are no allegations in *Kiss* that Flo Health
 6 received any user information from Facebook or other third parties. In other words, while the
 7 Facebook MDL focuses on claims that Facebook shared information about its users with third
 8 parties, *Kiss* and the Consolidated Flo Health Cases focus on allegations that information flowed
 9 in the opposite direction: from Flo Health to Facebook and others.

10 While *Kiss* and the Facebook MDL feature conflicting allegations, they also include
 11 different causes of action. In *Kiss*, the plaintiff asserts claims against Flo Health for common law
 12 invasion of privacy (*Kiss* Compl ¶¶ 168-183), invasion of privacy in violation of the California
 13 Constitution (*id.* ¶¶ 184-193), breach of contract based on Flo Health’s Terms of Use and Privacy
 14 Policy (*id.* ¶¶ 194-203), breach of implied contract based on those same agreements (204-217),
 15 breach of the Stored Communications Act (*id.* ¶¶ 226-240), violations of California
 16 Confidentiality of Medical Information Act (*id.* ¶¶ 241-254), and violations of California
 17 Business and Professional Code §§ 17200 *et. seq.* (*id.* ¶¶ 255-266). Against the non-Flo Health
 18 defendants, the plaintiff in *Kiss* asserts claims for violations of California Business and
 19 Professional Code §§ 17200 *et. seq.* (*id.* ¶¶ 267-277), aiding and abetting violations of California
 20 Business and Professional Code §§ 17200 *et. seq.* (*id.* ¶¶ 278-283), aiding and abetting breach of
 21 common invasion of privacy (*id.* ¶¶ 284-291), violations of the Federal Wiretap Act (*id.* ¶¶ 292-
 22 306), violations of the California Invasion of Privacy Act (*id.* ¶¶ 307-313). Against all defendants,
 23 the *Kiss* plaintiff asserts causes of action for unjust enrichment (*id.* ¶¶ 218-225), and a violation
 24 of the Comprehensive Computer Data Access and Fraud Act (*id.* ¶¶ 314-325). In contrast, the
 25 MDL Plaintiffs assert 49 causes of action, including many claims based on state law that have no
 26 application to *Kiss* and the Coordinated Flo Health Cases. MDL Pls.’ 2d Am. Comp. pp. 268-
 27 355.

28 Moreover, *Kiss* and the Facebook MDL do not share substantially the same parties. The

1 plaintiff in *Kiss* purports to represent a class of “all persons in the United States who used the Flo
 2 App between June 2016 through present.” *Kiss* Compl. ¶ 155. The class definition in no way
 3 overlaps with the purported class in the MDL: “all Facebook users in the United States and in the
 4 United Kingdom whose content and information, generated when they were eighteen years of age
 5 or older, was collected by Facebook and published and/or disclosed to third parties without their
 6 authorization or consent from January 1, 2007 to the present.” MDL Pls.’ 2d Am. Compl.
 7 ¶ 764(A). Additionally, there is only one common defendant in *Kiss* and the Facebook MDL:
 8 Facebook. None of the other four defendants in *Kiss*—Flo Health, Google, AppsFlyer, and
 9 Flurry—are parties in the Facebook MDL.

10 **II. *Moving Kiss from the Consolidated Flo Health Cases to the Facebook MDL Would***
 11 ***Unduly Burden Flo Health, the Court, and the Parties in Both Cases and Create the***
 12 ***Possibility of Conflicting Results.***

13 The Consolidated Flo Health Cases are pending in the Northern District before Judge
 14 Donato, where they will remain consolidated and proceed regardless of whether *Kiss* is moved to
 15 the Facebook MDL. There would not be unduly burdensome duplication of labor and expense or
 16 any danger of conflicting results if *Kiss* and the Consolidated Flo Health Cases are conducted
 17 before Judge Donato while the Facebook MDL continues to proceed before this Court. Indeed,
 18 just the opposite would occur if the Court grants the MDL Plaintiffs’ motion and designates *Kiss*
 19 as “related” to the Facebook MDL.

20 Moving *Kiss* from the Consolidated Flo Health Cases to the Facebook MDL would force
 21 Flo Health to defend itself on two separate fronts. Indeed, Flo Health would be forced to
 22 simultaneously defend itself from identical claims asserted by the same purported class in two
 23 different courtrooms in the Northern District. Like the *Kiss* plaintiff, the plaintiffs in the other
 24 Consolidated Flo Health Cases each seek to represent a class of all U.S. persons who used the Flo
 25 App from 2016 through present. And, as noted above, each of the Consolidated Flo Health Cases
 26 (including *Kiss*) revolves around the same core dispute: what information about its users (if any)
 27 Flo Health shared with third parties, and whether such disclosures (if any) violated the App’s
 28 Terms of Use and Privacy Policy.

It would be tremendously burdensome, expensive, and prejudicial to require Flo Health to

1 defend itself against the same allegations from the same purported classes in two different fora.
2 For example, Flo Health would have to raise the exact same legal issues in both the Consolidated
3 Flo Health Cases and the Facebook MDL. Flo Health would also be forced to engage in largely
4 duplicative and uncoordinated discovery in both the Consolidated Flo Health Cases and the
5 Facebook MDL. And Flo Health would be unduly forced to spend a significant amount of
6 resources by the very nature of being thrust into a complex MDL that has been proceeding for
7 more than three years and to which it has absolutely no connection.

8 Moreover, moving *Kiss* from the Consolidated Flo Health Cases to the Facebook MDL
9 would be considerably taxing on the Northern District's judicial resources. The parties in the
10 Consolidated Flo Health Cases will litigate the same legal, discovery, merits, and class issues
11 before Judge Donato. If *Kiss* is removed from the Consolidated Flo Health Cases and included
12 the Facebook MDL, this Court would then be required to confront and decide those same issues.
13 This unnecessary duplicative burden placed on the federal judiciary provides no upside. Indeed,
14 moving *Kiss* from the Consolidated Flo Health Cases to the Facebook MDL does just the opposite.
15 It needlessly creates the possibility for inconsistent rulings on each common issue that arises.

16 Lastly, moving *Kiss* from the Consolidated Flo Health Cases to the Facebook MDL would
17 be unduly burdensome for everyone already involved in the Facebook MDL. The Facebook MDL
18 has been proceeding for more than three years. The MDL Plaintiffs have already filed two
19 amended complaints, the Court has already addressed threshold legal issues, and the parties have
20 been painfully engaged in significant discovery before a special master. Adding *Kiss* to the
21 Facebook MDL would create the need for an additional track, as none of the progress made in the
22 Facebook MDL to date is applicable to *Kiss*.

23 CONCLUSION

24 The Court should deny the MDL Plaintiffs' administrative motion to relate *Kiss* to the
25 Facebook MDL.

1 Dated: August 16, 2021

Respectfully submitted,

2 DECHERT LLP

3 By: /s/ Brenda R. Sharton

4 Brenda R. Sharton

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5 Benjamin M. Sadun

6 *Attorneys for Flo Health, Inc.*

CERTIFICATE OF SERVICE

I, Benjamin M. Sadun, hereby certify that on August 16, 2021, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record. In addition, the following were served via email:

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Pursuant to Civil Local Rule 3-12, I further caused to be served true and correct copies of the foregoing to be served via U.S. Mail and email on counsel for the parties in *Kiss v. Flo Health, Inc. et al.*, No. 3:21-cv-04333-JD:

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I declare under penalty of perjury that the foregoing is true and correct.

7 /s/ Benjamin M. Sadun
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